United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2057

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P/S

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
LARRY JULIUS GIBBS,

Appellant,

-against-

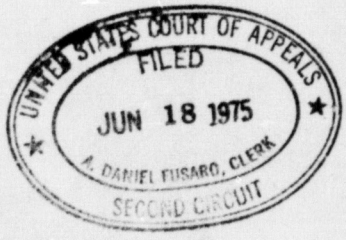
LEON J. VINCENT, Superintendent,
Green Haven Correctional Facility,

Appellee.

Docket No. 75-2057

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. LARRY JULIUS GIBBS, Appellant, -against- LEON J. VINCENT, Superintendent, Appellee.	:	Docket No. 75-2057

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the pre-trial identification procedures and the trial court's refusal to permit others, including appellant Gibbs's twin brother, to appear before the identification witnesses, violated appellant's constitutional right to due process of law.

2. Whether the failure of the State to produce Perry and Alston at the pre-trial suppression hearing rendered the identification testimony of those witnesses inadmissible at trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable John R. Bartels) rendered October 4, 1974, denying relator-appellant Gibbs's petition for a writ of habeas corpus. This Court granted a certificate of probable cause and leave to appeal in forma pauperis, and assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

After dark (at approximately 6:45 p.m.) on March 8, 1967, two men entered the Nuclear Dry Cleaning Store owned by Samuel Bleck on Linden Boulevard in Queens (23*). At the time Bleck was working at one of the counters in the store and one of his assistants, Margaret Perry, was seventeen feet away (136). A second assistant, David Alston, was working in a rear room behind closed doors (23-27). The two men proceeded to the counter where Bleck was working and

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*Numerals in parentheses refer to pages of the transcript of the State court trial. If preceded by "H", such numerals refer to pages of the transcript of the suppression hearing.

asked him for change of ten dollars (24). When Bleck stated he did not have change, one of the men pulled a gun and demanded Bleck's money (24).

At that moment the telephone rang and Perry answered it (136-137). Shortly thereafter Alston emerged from the back room (27-28). Bleck gave the men $500 to $600 from the cash register, a cash drawer, and his own pockets, following which the men left (25-29). Perry estimated that thirty-five seconds elapsed between the time the gun was first pulled and the men left the store (155). Bleck estimated that approximately a minute elapsed from the time the men entered the store until they left (52).

When the men left, Bleck telephoned the police, who arrived at the store shortly thereafter. Bleck told the police only that both robbers were black and that one was approximately twenty-five years old, 5'9" tall, and weighed 185 pounds, while the other was approximately six feet tall and weighed less (86). Adelson, one of the police officers, then showed Bleck a book of photographs he was carrying, from which Bleck selected a photograph of appellant Gibbs as being the first robber he had described. Perry was present when Bleck chose the photograph of Gibbs, but the testimony does not indicate whether she confirmed Bleck's identification (H.31-32). Bleck did not recall whether Alston was present at this photographic identification (H.31).

Bleck was then taken to the precinct station where he

selected an identical photograph of Gibbs from a different group of photographs (H.35).

Six days later, on March 14, 1967, Adelson and several other police officers went to Gibbs's home to arrest him. Since appellant Gibbs was playing at the community center at the time, his mother, at the request of the police, sent his sister to bring him home (H.52, 213). Moments later Gibbs returned home, but was preceded to the house by his twin brother, Garry (259-260). According to appellant Gibbs's mother, the police first seized Garry, mistaking him for Larry (259, 260, 263, 290). When Larry Gibbs identified himself, the police then arrested him for the robbery (H.59). Although Mrs. Gibbs urged the police to search the house, convinced they would find no weapon or any of the clothing the robbers might have been described as wearing, the police declined to do so (221). Mrs. Gibbs also requested a lawyer for her son, either while the police were still at her home (H.74) or when she arrived at the precinct a short time later H.94-95), but was told by the police that her son would not need a lawyer since the police were merely going to ask him some questions (H.74).

Gibbs and his parents were then taken to the precinct house by the police. Although Officer Adelson had seen Garry Gibbs, appellant's brother, and had been informed by the boys' father while they were still at the Gibbs home that the boys were twins (H.68), Garry was not taken to the precinct house

to participate in the subsequent identification proceedings.

Bleck was then called by the police and told to come to the precinct and "identify the man" (88-89). At the precinct Bleck was asked to look through a one-way mirror into a room where Gibbs had been seated facing him. The only other occupants of the room were Gibbs's parents, whom Bleck later described as "elderly," and a white police officer (41). In this setting, Bleck selected appellant Gibbs as the first robber, despite the fact that Bleck had earlier described that robber as being twenty-five and weighing 185 pounds, whereas Gibbs was only seventeen and weighed only 135-140 pounds (268-269).

Perry and Alston were also brought to the precinct. After speaking to Bleck, they were taken by Bleck to the adjoining room where they identified Gibbs under the same showup circumstances (159-161, 189-191). No lineup was ever held (216), and the three witnesses were never asked to distinguish between Gibbs and his twin brother or any other individual.

Prior to trial, counsel for Gibbs moved to suppress "the identification made of said defendant." This case took place before the change in the New York Criminal Procedure Law which requires the prosecution to notify the defense of its intention to offer eyewitness testimony at trial (see C.P.L. §710.30 (effective September 1, 1971)), and the affidavit attached to the motion to suppress indicated that

counsel for Gibbs had been able to learn on his own only of the identification by the complaining witness, Bleck. (The motion to suppress is set forth as C to appellant's separate appendix). At the commencement of the hearing defense counsel, while still focusing primarily on Bleck's anticipated identification testimony, also stated that he expected the District Attorney, in response to the motion to suppress, to call 'those persons who are alleged to have identified the defendant Larry Gibbs previous to his appearance here today in court" (H.2). At the hearing, however, the only identifying witness called by the prosecution was Bleck.

Prior to Bleck's testimony, defense counsel requested permission of the court to have Gibbs's twin brother Garry sit at the defense table with the defendant so as to test the witness Bleck's identification of the defendant Gibbs as the first robber (H.2). The trial court denied this request on the ground that the pre-trial hearing was not for the purpose of determining the question of identification, but only to determine whether the defendant had been afforded due process of law (H.3).

At the conclusion of the suppression hearing, defense counsel again moved for the "suppression of the identifications made of this defendant" (H.99), referring to "Mr. Bleck and the other witnesses who are called to identify this individual" (H.120). The motion to suppress was denied, the trial judge saying, however, that it would have been a "fairer

situation had a line-up of the two brothers been had" (H.118).

Appellant Gibbs's first trial commenced on January 28, 1968, and ended in a declaration of a mistrial. His second trial, which ended in the conviction which is the subject of this present proceeding, commenced on September 9, 1968. Bleck, the prosecution's principal witness, described the robbery and the identification procedures as set forth above. However, his description of the robbers was inconsistent with his previous statements. Police reports established that Bleck, before the station house showup with appellant Gibbs, had originally told the police that the first robber was twenty-five years of age and weighed 185 pounds, and that the second robber was lighter in weight than the first. After seeing Gibbs (who was seventeen years of age and weighed 135-140 pounds) and identifying him as the first robber, however, Bleck testified at the hearing and trial that he had originally told the police that the first robber was twenty years of age and had a "long face" and that the second robber was heavier than the first. It was only after extensive cross-examination that Bleck admitted that the police report of his original description, and not his trial testimony, was correct.

Concerning his ability to observe the robbers and recall their features during this brief encounter, Bleck testified that he wore glasses and was required to wear them for driving, but that he had not been wearing glasses during the rob-

bery (73-75). He also testified that he was upset and in fear during the robbery because of the presence of guns (34-35).

Perry was also called by the prosecution as an identification witness. She testified that she had been unable to give the police any description of the robbers and could not give any description of them at the trial because during the robbery she had been "watching the gun" (158). Moreover, Perry had considerable difficulty identifying appellant Gibbs in the courtroom (139-141) despite the fact that the only other black persons in the courtroom were one juror and two uniformed court officers, one of whom was a good friend of Perry's (162-164).

Alston, the third identification witness, had been in the back room of the store when the robbery commenced and had entered the front room less than thirty seconds before the robbers left. Consequently, he could not even state whether the first robber was taller or shorter than the second, could not describe what they were wearing, and was unable to describe the guns they were holding (182-187).

During trial, defense counsel again requested permission of the court to have the defendant's twin brother and another individual who looked like the defendant sit with the defendant at the defense table for the purpose of challenging the in-court identification testimony. The trial court again denied this request (127-133).

The identification testimony was the sole evidence presented by the prosecution to incriminate appellant Gibbs. No clothing, fingerprints, money, or weapons were introduced to corroborate the claim of these witnesses that Gibbs was one of the robbers.

The defendant Larry Gibbs presented an alibi defense. Leonard Jonson, his first witness, testified that he had been with Gibbs on March 8, 1967, the day of the crime, constantly from 10:00 a.m. until 11:00 p.m., during which time they were first at Johnson's home, then at the Neighborhood Community Action Center, and later at a particular address in Brooklyn looking for jobs (233-236). Gibbs later left the Johnson apartment with John Johnson, Leonard's brother (236), who was on his way to work. John Johnson then took the witness stand and corroborated these facts himself (242).

Appellant's mother testified that Larry had arrived home at 12:30 a.m. on March 9 (254).

At this point in the trial, both counsel stipulated to the reading of the stenographic record of the testimony of a Rosa Frazier, who had testified for appellant Gibbs in the previous trial (declared a mistrial) and who was unavailable as a witness in the instant trial. Ms. Frazier was a worker in the Community Action Center, and corroborated the testimony of appellant Gibbs and Leonard Johnson that they had visited the center on March 8 in an attempt to find work. She also authenticated the attendance sheet for that date

which showed that both Gibbs and Leonard Johnson had signed in at the center in the early afternoon (313, 315, 318-319).

Prior to the arrest in this case, Larry Gibbs had never been adjudicated a juvenile delinquent or youthful offender, nor had he ever been convicted of any crime (270).

After deliberation, the jury found him guilty of first degree robbery. On October 24, 1968, Gibbs was sentenced to an indeterminate term of imprisonment of ten to twenty years.

On appeal to the State courts Gibbs raised all the issues he later raised in his application for writ of habeas corpus. The Appellate Division affirmed his conviction without opinion, 36 A.D.2d 689 (2d Dept. 1971), and the Court of Appeals denied leave to appeal on April 1, 1971.

In his habeas corpus application, Gibbs argued that the identification procedures in his case violated his constitutional rights of due process, thereby rendering the identification testimony inadmissible at trial. He also argued that the State courts had erred in failing to hold a hearing to determine the admissibility of Perry's and Alston's identification testimony. Judge Bartels of the United States District Court for the Eastern District of New York denied the application. Concerning the identification procedures, Judge Bartels found that the station house show-up was suggestive and that Bleck's description of the first robber differed significantly from appellant Gibbs's features, but that "certainty" of the eyewitnesses' identification estab-

lished that there was no likelihood of misidentification. He also found that due process was not violated by the failure of the police and the trial court to test the eyewitnesses' identification through a lineup which included Gibbs's twin brother. And the District Judge further held that defense counsel had waived his right to a hearing to determine the admissibility of Perry's and Alston's identification testimony.*

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*A copy of the District Court opinion is set forth as B to appellant's separate appendix.

ARGUMENT

Point I

THE PRE-TRIAL IDENTIFICATION PROCEDURES AND THE TRIAL COURT'S REFUSAL TO PERMIT OTHERS, INCLUDING APPELLANT GIBBS'S TWIN BROTHER, TO APPEAR BEFORE THE IDENTIFICATION WITNESSES, VIOLATED APPELLANT GIBBS'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Eyewitness identification of an accused is inherently unreliable. "The mere fact that three or four witnesses identify a suspect provides no assurance that they are correct, especially when all have been subjected to a suggestive identification procedure." Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965) at 11. Given the significant danger of misidentification and a jury's high degree of receptivity to identification testimony, including misidentification, as conclusive proof of guilt (id. at 19), it is necessary to examine the "totality of the circumstances" surrounding the identifications in order (1) to determine whether the pre-trial confrontation between witnesses and accused was "unnecessarily suggestive" and, if so, then to determine (2) whether that confrontation was "conducive to irreparable mistaken identification." Stovall v. Denno, 388 U.S. 293, 301-302 (1967).*

*The trial in this case pre-dated the Supreme Court's rulings in Wade v. United States, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967).

Additionally, this Court must determine whether, in the peculiar context of this case where the police failed to conduct a lineup and the trial court refused to permit defense counsel to test the eyewitness identifications with an in-court procedure which would permit appellant Gibbs's twin brother and another look-alike to sit at counsel table during the in-court identification testimony, these procedures violated not only Gibbs's due process protection against suggestive identification procedures, but also his due process rights to present evidence and confront witnesses against him.

In the present proceeding, the State has conceded that the show-up at the precinct on March 14, 1967, was impermissibly suggestive:

> ... The people do not argue that the police station show-up which took place in the case at bar meets the standards of due process as set out by the Supreme Court.
>
> Respondent's brief to the Appellate Division at 13.

The District Court so found (Opinion, Appendix B, at 4), thereby establishing the first prong of the Stovall test.*

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*This determination was clearly correct. The only persons in the room at the time the witnesseses observed the show-up were appellant Gibbs (seated facing a one-way mirror), a white police officer in uniform, and Gibbs's parents, whom the witnesses described as "elderly." Clearly Gibbs was the only person present who even remotely resembled the first robber. Moreover, the police never claimed to have needed a speedy identification. Compare Stovall v. Denno, supra, 388 U.S. 293; United States v. Reid, slip opinion 3073 (2d Cir., April 24, 1975). They could easily have determined the ques-

Consequently, identification testimony was constitutionally inadmissible unless the suggestive identification procedures did not create a likelihood of misidentification. The "totality of the circumstances" in this case, including the concededly suggestive show-up, the entire chronology of pre-trial and trial procedures relating to identification, and the weakness of the State's case independent of the identification forcefully establish the substantial likelihood that the wrong man was prosecuted.

The critically important circumstance here was the fact that the police and the prosecution uncovered no evidence whatsoever to corroborate the identification testimony. Compare United States v. Bynum, 485 F.2d 490 (2d Cir. 1973); United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir. 1973). There were no fingerprints, no gun, no clothing, no stolen money, no incriminating statement, no testimony of an accomplice -- there was not even some form of circumstantial evidence which tended to corroborate the eyewitnesses' accusation of the defendant as the robber. In fact, when the police came to the Gibbs home to arrest Larry Gibbs, Gibbs's mother, convinced they were arresting the wrong person, urged the police to search the house for clothing, a gun, money, or any other incriminating evidence. The police declined this

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(Footnote continued)

tion of identification through the use of a lineup, hopefully one which included appellant Gibbs's twin brother.

invitation. If Larry Gibbs had, in fact, been one of the robbers, the police, focusing on this defendant during the year and a half between the crime and the trial, would certainly have been able to uncover some item of evidence to corroborate his guilt. Their inability to do so strongly indicates that they were focusing their investigation upon the wrong person.

Since there was no corroboration, the question of whether the eyewitnesses had correctly identified Gibbs as the perpetrator was the sole issue at trial. In this context, the decision of the police initially to place the suspect in a show-up rather than in a lineup composed of other persons resembling him or including his twin brother Garry greatly increased the likelihood that the eyewitnesses would mistakenly identify Larry Gibbs as the robber.

The police admitted being aware that Gibbs had a twin brother before they conducted the suggestive show-up. Indeed, Mrs. Gibbs testified that the police arrested Garry when he entered his home with Larry, believing Garry was the accused. They could thus easily have taken the twin to the station house with Larry Gibbs and confronted the witnesses with a lineup which included both brothers.

Similarly, the likelihood of misidentification was compounded when the trial judge, both at the suppression hearing and at the trial, denied defense counsel's request to have a look-alike as well as the twin brother sitting at the

defense table when the eyewitnesses were asked to identify the person they believed to be the robber. The procedures at the suppression hearing and the trial, like the station house show-ups, limited the eyewitnesses' exposure to appellant Gibbs. Thus, any need for them to distinguish him from other persons with similar features was eliminated, thereby assuring that the wintesses would identify Gibbs as the first robber regardless of whether he was in fact the man. Absent such a test, there was no evidence of the witnesses' ability to identify the right man, and consequently no valid evidence that appellant Larry Gibbs had been properly accused.

Given the peculiar circumstances of this case -- the absence of any corroborating evidence whatsoever and the existence of a twin brother and another look-alike -- due process and the interests of justice required that the eyewitnesses be tested to determine their ability to distinguish between the person they had accused and these other persons. Otherwise the danger that Larry Gibbs was not the robber and was being identified as such merely because he had similar features, was simply too great. The failure of the police to conduct a lineup under these circumstances violated due process; thereafter, the refusal of the trial court to permit a fair test of the validity of the eyewitness testimony violated not only the due process protection against suggestive identification procedures, but also its guarantee of a defendant's right to present evidence and confront witnesses

against him. Compare Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Smith, 473 F.2d 1148 (D.C. Cir. 1972); United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972).

Other circumstances surrounding the station house show-up also increased the likelihood of misidentification. Thus, at the station house show-up, the police told Bleck, before he observed Gibbs, that he was to come down to the station house to "identify the man" (compare Foster v. California, 394 U.S. 440, 443 (1969)), thereby convincing Bleck that the police believed the man they were going to show Bleck was one of the robbers. Misidentification by Perry and Alston was also encouraged when, before they first observed Gibbs, Bleck was permitted to speak to them and then personally escort them together to the room where Gibbs was being held.

The fleeting opportunity for the eyewitnesses to observe the robbers at the time of the crime and the distractions which diverted their attention from that observation are yet additional factors contributing to the likelihood of misidentification in this case. Compare Neil v. Biggers, 409 U.S. 188, 199-200 (1972). The entire robbery, from the time the robbers entered the store until they left, lasted only one minute.* During a substantial portion of that brief period eyewitness Bleck, rather than observing the robbers, was occupied with removing money from the cash register, the

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*Although it was dark outside, there was no testimony as to the adequacy of lighting inside the store.

cash drawer, and his wallet. Moreover, Bleck testified that he wore glasses and was required to wear them for driving, but had not been wearing them at any point during the robbery. He also testified that he was nervous and upset because of the presence of the gun, a state of mind which certainly would interfere with his ability to observe and recall the appearance of the robbers with any degree of accuracy.

Perry, the second eyewitness, was diverted by a telephone call which came in while the robbery was in progress. Even during the portion of the one-minute-long robbery when she was not preoccupied her attention, by her own admission, was directed not at the robbers but at the gun.

Alston, the third eyewitness, was working in the back room of the store behind closed doors during at least the first half of the minute in question. His observation of the robbers for less than thirty seconds was hardly a prolonged period in which to crystallize their features on his mind, and there was no testimony that he had, in fact, tried to do so.

The eyewitnesses' inability to give any sort of detailed description of the robbers further attests to the deficiencies of their observation of the robbers, and is another factor increasing the likelihood of misidentification. Compare Neil v. Biggers, supra, 409 U.S. at 199-200. Bleck could describe the first robber only as black, 5'9" tall, twenty-five years old, and weighing 185 pounds. He described

the second robber only as taller and lighter in weight than the first. Perry testified that she could give the police no description of either of the robbers because she had been focusing on the gun. No description by Alston was attested to either at the suppression hearing or at the trial. None of the witnesses could provide any details or distinguishing features concerning either robber.

The inconsistencies between Bleck's description of the first robber and Gibbs's characteristics is yet another circumstance contributing to the likelihood of misidentification. Gibbs was only seventeen years old and weighed only 135-140 pounds. This, of course, was significantly different from the twenty-five year old, 185 pound robber Bleck had described to the police immediately after the robbery. In this regard, it is instructive to note that Bleck, after observing appellant Gibbs, testified to a substantially different description of the first robber at trial. With Gibbs sitting before him, Bleck now claimed that he had told the police immediately after the robbery that the first robber was <u>twenty</u> years of age (rather than twenty-five), had a long face, and was <u>lighter</u> in weight (rather than heavier) than the second robber. This demonstrated willingness by Bleck to alter his testimony in order to insure appellant Gibbs's conviction is indicative not only of his unreliability as a witness but also of his receptivity to suggestive procedures, and undermines the certainty of his identification of appellant Gibbs as the

robber.*

The substantial likelihood of misidentification in this case is dramatically demonstrated if one takes a moment to examine the chronology of events with the presumption that appellant Larry Gibbs was not one of the robbers and that an inexorable chain of events, including the suggestive identification procedures, led nonetheless to his conviction: In less than a minute two men enter and rob the shop. It is dark. The owner and two employees are distracted in various ways from observing the features and characteristics of the robbers which would tend to distinguish them. Their distress over the fact that the robbers are weilding guns further interferes with their observation. When the police arrive a short time later, only one of the witnesses -- the owner -- is able to report any observations, and that report is but a vague, general description of the two men, containing no detail which would be helpful in singling the specific men

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*Another factor which should be considered by this Court was the suggestion which Mrs. Gibbs made to the police that her son should have a lawyer and the response by the police that a lawyer was not necessary because Gibbs was only going to be asked some questions. The police, by discouraging appellant Gibbs's parents from obtaining a lawyer for him and by confronting Gibbs with the witnesses in a suggestive show-up rather than a lineup including Garry Gibbs, the twin brother, demonstrated their determination to use the identification procedures to bolster the accusation of Gibbs rather than to determine fairly whether Gibbs was in fact one of the robbers, thereby further increasing the likelihood of misidentification.

who had robbed the store out of a group which must consist of thousands fitting the general description the store owner was able to provide the police. The owner is then shown a spread of mugshots, fifty percent of which are immediately disqualified because the men depicted are not black. There is no evidence as to how many of the photographs fit even the general description the owner had given of the robbers. The owner, Bleck, then selects a photograph of appellant Gibbs because it resembles his sketchy recollection of one of the robber's features. At least one, and possibly both, of the other eyewitnesses observes his employer's selection of the photograph, but apparently neither confirms nor denies the validity of his choice. At the station house Bleck examines another set of photographs, during shich he is naturally inclined to select, and in fact does select, the identical photograph of appellant Gibbs. It is entirely possible that, had a photograph of appellant's twin brother or the other look-alike later identified by the defense been included in those photographic displays, Bleck would have selected one of those individuals rather than Gibbs as being the first robber. Despite this fact, the police investigation from this point forward focused solely on Gibbs.

Six days later Bleck is asked by the police to come to the station house to "identify the man." Given this instruction he naturally assumes that the police have arrested the individual whose photograph he had earlier selected as being one of the robbers. Consequently, when Bleck is confronted

at the station house with Gibbs alone, he is predisposed to confirm his previous selection of Gibbs's photograph by identifying him as one of the robbers, despite the obvious differences in age and weight between Gibbs and Bleck's earlier description.

The two employees are also called to the station house. Before being taken to try to make an identification, they are permitted to speak to Bleck,* who then personally escorts them together to the room where Gibbs is being held. Seeing only Gibbs, they agree that he was one of the robbers. The witnesses are never asked to select the person they believed to have been one of the robbers from a lineup, nor are they ever asked to distinguish him from his twin brother or any other look-alike. Between the robbery and the trial, the police are able to discover absolutely no evidence to corroborate the witnesses' claim that Gibbs was one of the robbers. As would be expected, at trial the witnesses re-identify the person they saw at the station house as being one of the robbers. Defense counsel's request to be permitted to test the accuracy of the witnesses' identification through an in-court lineup including Gibbs's twin brother and another look-alike is repeatedly denied.

The suggestiveness of these procedures clearly gave rise

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*Bleck in all likelihood informed them of his belief that the individual being detained was one of the robbers.

to a substantial likelihood of misidentification. The District Judge's conclusion to the contrary was based on what he regarded as "certainty" of the witnesses' identification of Gibbs. This conclusion, however, ignores the fact that it was the suggestiveness of the procedures employed and the refusal of the police and the trial court to allow the identification to be tested in a lineup which produced that "certainty." How certain would these same witnesses have been if, instead of a show-up, they had been asked to identify the robber from a lineup which included appellant Larry Gibbs, his twin brother Garry, and the other look-alike later identified by the defense? The failure of the police and the state trial court to permit this question to be answered violates due process of law and fundamental considerations of justice, and requires that the writ of habeas corpus be granted.

Point II

THE FAILURE OF THE STATE TO PRODUCE PERRY AND ALSTON AT THE PRE-TRIAL SUPPRESSION HEARING RENDERED THE IDENTIFICATION TESTIMONY OF THOSE WITNESSES INADMISSIBLE AT TRIAL.

When trial counsel moved to suppress the identification testimony, he had no way of knowing what persons, other than Bleck, the complaining witness, would be called to identify Gibbs at trial as the first robber. Consequently, he couched his suppression motion in general terms, asking for an order "suppressing the identification made" of the defendant.* Similarly, at the commencement of the suppression hearing, trial counsel stated that he expected the prosecution to produce at that hearing "those persons who are alleged to have identified the defendant Larry Gibbs previous to his appearance here today in court." The State, however, produced only Bleck, thereby implying that he was the only identification witness on whom the prosecution would rely at trial. Although testimony at the hearing indicated that Perry and Alston had also identified Gibbs at the station house show-up, the State never indicated that it intended to call those individuals as identification witnesses at trial, and failed to produce them at the suppression hearing to determine whether their testimony would be admissible.

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*Trial counsel's motion to suppress the identification is C to appellant's separate appendix.

At the conclusion of the suppression hearing trial counsel renewed his motion "for a suppression of the identifications made of this defendant," and referred to "Mr. Bleck and the other witnesses who are called to identify this individual." The trial court, without hearing testimony from either Perry or Alston as to the basis for their identification of Gibbs, denied the motion. Given this denial, no further objection was made to the testimony of any of the three identification witnesses at trial.

On appeal to the State courts and in his habeas corpus application to the District Court, appellant Gibbs argued that, even assuming arguendo the admissibility of Bleck's identification testimony, the denial of the motion to suppress identification and the admission of the identification testimony of Perry and Alston at trial was error. In support of this argument, Gibbs pointed to the fact that Perry and Alston had not testified at the suppression hearing and that, absent their testimony, there was no evidence introduced at the hearing which would establish that either of them had a basis, independent of the suggestive identification procedures, for the identification of Gibbs as one of the robbers.

The District Court held that Gibbs had "waived" this issue, first by addressing the suppression motion only to the identification made by Bleck, secondly by failing to call Perry or Alston at the suppression hearing, and finally by failing to object either to the State's failure to produce

these witnesses at the hearing or to the introduction of their testimony at trial.

The District Court's finding that the suppression motion was addressed only to Bleck's identification testimony is refuted both by the motion papers and by the hearing transcript. The first page of the motion requested an order "suppressing the identification made of said defendant," without any suggestion that such an order should be limited to Bleck's testimony. Since under New York law then in effect the prosecution was not required to inform the defense which or how many identification witnesses it intended to present at trial,* trial counsel had no way of naming Perry or Alston in the motion papers. Logically, he would expect the complaining witness, Bleck, to be called by the prosecution, and therefore the affidavit attached to the suppression motion described, to the best of counsel's knowledge, the identification procedures employed with that witness. It concluded, however, by repeating the general request for an order "suppressing the identification made of this defendant." Any doubt as to the scope of the suppression motion was eradicated by counsel's statement, at the commencement of the suppression hearing, that he expected the prosecution to produce at that hearing "those persons who are alleged to have identified

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*New York C.P.L. §710.30, imposing such a requirement, did not become effective until September 1, 1971.

the defendant Larry Gibbs previous to his appearance here today in court" and his request at the conclusion of the hearing testimony for "suppression of the identifications [--plural--] made of this defendant," and by his reference concerning that motion to "Mr. Bleck and the other witnesses who are called to identify this individual." Clearly, therefore, the District Court erred in finding that the motion to suppress sought suppression of only Bleck's testimony. It was, rather, directed at all identification testimony the State intended to introduce at trial.

The District Court's second theory, that Gibbs's failure to produce Perry and Alston at the suppression hearing constituted waiver, misconstrues the burden of proof on the suppression issue. Once an impermissibly suggestive identification procedure such as the show-up in this case is shown to have occurred, the burden is on the State to show by clear and convincing evidence that each witness affected by that procedure had an untainted and independent basis for his or her identification testimony. People v. Ballott, 20 N.Y.2d 600 (1967); United States ex rel. Whitmore v. Malcolm, 476 F.2d 363, 365 n.2 (2d Cir. 1973); see also Wade v. United States, supra, 388 U.S. at 240; Gilbert v. California, supra, 388 U.S. at 272; cf. Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 79 n.18 (1964). Consequently, the burden was on the State, and not on the defendant, to produce Perry and Alston and to establish the independent basis

for their testimony. Clearly, counsel's refusal to assume the State's responsibilities did not constitute a waiver of the right to a valid determination of the admissibility of those witnesses' testimony.

The District Court's third theory, that trial counsel's failure to object either to the absence of Perry and Alston at the suppression hearing or to their testimony at trial constituted waiver, is similarly contradicted by the record. The general nature of the suppression motion, coupled with counsel's above-quoted statements at the suppression hearing, were clearly sufficient objection to any identification witnesses, including Perry and Alston, which the State might introduce at the subsequent trial. The suggestion that in addition counsel must also object to the State's failure to produce the necessary witnesses to carry its burden of proving an independent, untainted basis for their testimony has no support in law.*

The failure of the State to produce Perry and Alston at the suppression hearing was, by itself, a failure of the State's burden of proof, rendering the trial court's denial

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*Even if this Court were to accept the District Court's finding of waiver at trial, the fact that this issue is of constitutional dimension and was raised on direct appeal before the State's Appellate Division means, under New York law and decisions of this Court (see, e.g., United States ex rel. Schaedel v. Follette, 447 F.2d 1297, 1300 (2d Cir. 1971)) that there was no waiver as a matter of law. Appellant Gibbs is thus entitled to a resolution of the merits of this issue.

of the motion to suppress as to those two witnesses reversible error. However, the testimony at trial provides additional evidence that neither of these witnesses had an independent basis for his identification testimony. Perry explained that she had been unable to give any description whatsoever to the police immediately after the robbery because she had been looking not at the robbers, but at the gun. Moreover, during the robbery she was further distracted from observing the robbers by having to answer the telephone. Alston, for the first half of the one-minute robbery, was in the rear room of the dry cleaning store, behind closed doors. There was no testimony at the hearing or the trial that he gave any description to the police. Neither Perry nor Alston identified either of the robbers from the photographic spreads. Moreover, at the station house six days later both of them spoke to Bleck (who had already seen and identified Gibbs) before he took them together to the room where Gibbs was being held to observe him in the concededly suggestive show-up. Finally, at trial Perry had considerable difficulty identifying Gibbs despite the fact that the only other black persons in the courtroom were a juror and two uniformed court officers, one of whom was a personal friend of Perry's.

From the above-stated facts it is clear that the State failed to establish any independent basis for Perry's and Alston's identification testimony. It was therefore error for the trial court to admit their testimony at trial. If,

however, this Court should find that, by virtue of the State's failure to call either of these witnesses at the suppression hearing the record is incomplete on this issue, the case then should be remanded to the District Court for a hearing on the admissibility of these witnesses' testimony. 28 U.S.C. §2254; Townsend v. Sain, 372 U.S. 293 (1965).

CONCLUSION

For the foregoing reasons the order of the District Court must be reversed and the case remanded with instructions to enter an order granting the writ of habeas corpus, vacating the judgment of the State court, and directing dismissal of the indictment; alternatively, the case must be remanded to the District Court for a hearing.

Respectfully submitted,

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Certificate of Service

June 18, 1975

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Michael D. Young